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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-293

IRRIGATION AND POWER EQUIPMENT, INC. a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

v.

SIMS CONSOLIDATED, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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1. Questions for Review

a. The first question of which Petitioners seek review appears to be:

"Were Petitioners denied due process in an action for declaratory judgment of validity and enforcement of a contract tried by the District

Court, without a jury, where the testimony of all witnesses was taken by deposition on oral examination as provided in Rule 30 Fed. R. Civ. Proc., some of which depositions were also recorded by audio-visual means, and the trial court, after having considered briefs and closing arguments, considered the physical exhibits and read transcripts of some, but not all, depositions filed in the court, rendered its decision and entered final judgment."

b. The second question appears to be:

"Where the trial court determined (and the appellate court affirmed) that domestic (California and Colorado) law was applicable to the contract in suit and that the contract was valid and enforceable under such law, was it encumbent upon the court to also consider, invoke and apply Australian law under the provisions of the International Monetary Fund Agreement of 1945?"

2. Petition Fails to Meet Requirements Of Supreme Court Rule 19

a. Criteria to be Considered

The Petition for Writ of Certiorari, as viewed by Respondent, does not fall within the scope of the considerations set forth in Supreme Court Rule 19, except to the extent that Petitioners assert that the judicial proceedings in the non-jury trial in the District Court (sanctioned by the Court of Appeals for the Tenth Circuit in affirming the judgment of the district court) ". . . so far departed from the accepted and usual

course of judicial proceedings as to call for this court's power of supervision. . ." (Petition, page 3).

Petitioners tried, unsuccessfully, to establish in the lower courts that the contract in suit was void and unenforceable under Australian law and therefore the provisions of the International Monetary Fund Agreement of 1945 must be invoked. On appeal, however, Petitioners did not challenge the correctness of the holding of the trial court (affirmed by the appellate court) that only domestic (California and Colorado) law applies to the contract in suit. There is no showing or submission by Petitioners that such holding is in conflict with decisions of any other courts of appeals or of this court. Thus, there is no support for Petitioners' contention that the action of the lower court should be reviewed by this court.

b. Denial of "Trial in Open Court"

The Court of Appeals for the Tenth Circuit pointed out that "Appellants voluntarily chose trial by deposition as part of their trial tactics. Having so elected, they cannot now allege denial of their right to trial." (Appendix to Petition, 37A).

Petitioners failed to advise this court that it was Petitioners who first utilized, over Respondents' objection, the video-audio taping technique in the deposition of its principal witness Robert S. Charles in California. (See Record below, Vol. VII, Vol. XXVII, pp. 336-37, 343-46). A copy of Petitioners' "Notice of Deposition" and of Petitioners' "Memorandum in Opposition" are reproduced as a supplemental appendix to this brief.

The "trial in open court" to which Petitioners refer was held in two parts. The first was held on September 10, 1973. (Appendix to Petition, 46A-47A) when closing arguments by counsel were heard on the issue of validity and enforceability of the contract in issue, the court having previously considered the briefs and having examined some, if not all, of the transcripts of testimony. The second was held on February 21, 1974 on the issue of enforcement to collect the amounts owed under the contract (Appendix to Petition, 49A, para. 6). In the latter phase of the trial, all of the testimony was given by live witnesses who testified in open court. In neither case did either petitioner or respondent move to stay proceedings pending application to the Court of Appeals for the Tenth Circuit for a writ in the nature of mandamus to compel the district court to conduct the depositions or either part of the trial in a different manner. Indeed, there was acquiescence in the procedure on the part of both counsel (Appendix to Petition, 65A; Supplemental Appendix 1, 2-4).

Suffice it to say that this court should not grant certiorari to determine whether or not a district judge must read every word of every deposition at every stage of a case as a prerequisite to rendering judgment in that case, particularly when a full review of evidence by the appellate court finds such deposition testimony to be immaterial. (Appendix to Petition, 38A-39A).

c. "Separation of Powers"

Petitioners have presented a "bootstrap" argument to the effect that the courts in this case have ignored

the constitutional treaty making power of the executive branch in refusing to apply the terms of the International Monetary Fund Articles of Agreement (the 1944 Bretton Woods Agreement) to the contract in suit. Such argument is specious in view of the fact that the District Court and the Circuit Court of Appeals held that the validity and enforcement of the contract in issue are governed by the laws of the United States (California and Colorado), and that under such law the contract *is* valid and enforceable. Accordingly, the lower courts did not find it necessary to consider or apply either Australian law or the provisions of the IMF Agreement of 1945 (Appendix to Petition, 42A).*

d. Petition in Violation of Supreme Court Rule 40, Paragraph 5

The Petition is far from being "free from burdensome, irrelevant, immaterial and scandalous matter" as required by Supreme Court Rule 40, which matter should, therefore, be disregarded and stricken.

It is obvious that applicability of Australian law to the contract would be a prerequisite to application or interpretation of the International Monetary Fund Agreement to the contract in suit. Wherefore, all references to the Australian Banking Regulations and the International Monetary Fund Agreement are *irrelevant.*

---

*At no point does Petitioner challenge the correctness of the holdings below that neither Australian law nor the provisions of the International Monetary Fund Agreement of 1945 are applicable to the contract in issue.

It is apparent on its face that the petition is "burdensome". Five typewritten pages are devoted to a "statement of the case" (Petition, 5 through 9), notwithstanding the fact that the opinions of the lower courts clearly set forth the facts and law of the case and were reproduced in their entirety in the Appendix to the Petition. (Appendix to Petition 1A-42A).

Respondent respectfully submits that Petitioners have made scandalous charges against Respondent on pages 13 and 14 of the petition. Without any evidence whatever in support thereof, Petitioners assert that Respondent "surreptitiously" sought retroactive approval of the contract in suit by the Australian government authorities after Petitioners unilaterally sought to rescind the agreement and that the approval was thereafter "deceptively sought" by Respondent.

Petitioners' positions throughout the controversy with Respondent have been totally devoid of merit and are believed to have been interposed solely for the purpose of delaying payment of amounts lawfully due Respondent under the contract in suit. Indeed, the Circuit Court of Appeals not only indicated it was "puzzled" by Petitioners' ambivalent position on the manner of conducting the trial (Appendix to Petition, 37A) but also was critical of Petitioners' contentions on the merits of the case, stating:

> "These theories, advanced in defiance of logic and without support of cogent authority, do not comport with the facts of this case". (Appendix to Petition, 39A)

The Court of Appeals said further, with respect to Petitioners' ill-founded contention as to lack of consideration for the contract:

"Appellants' argument that the contract lacked consideration is, as noted by the trial court, illusory. The speculative arguments of appellants give rise, at best, to the possibility that there was not a meeting of minds. Such a speculative conclusion, however, would be diametrically opposed to the facts which establish the formation of a contract, its execution and continued vitality, and the unilateral termination and repudiation thereof by Appellant Smith. (Appendix to Petition 40A)

3. The Law

a. Procedure

There is no issue of law left for this court to settle as a "substantial federal question" or a departure from "accepted and usual course of judicial proceedings", since this court settled in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) that reference of a case to a master is discretionary, and the use at trial of depositions taken under Rule 30 Fed. R. Civ. P. is governed by Rule 32 Fed. R. Civ. P. and the option was given the parties to bring the case to trial by either means. The normal procedure for seeking judicial review of Petitioners' grievance would have been by the means set forth in the Federal Rules of Civil Procedure, Rules 30 and 32, or by seeking a writ in the nature of mandamus, as in the *La Buy* case, *supra*.

This court distinguished the facts in the recent case of *Wingo v. Wedding*, 418 U.S. 461 (1974) from those in *La Buy v. Howes Leather Co.*, *supra*, in that the action taken in *Wingo* was contrary to a specific rule (statute) requiring not only a "hearing" but that such

hearing be held by the *court*, not a magistrate. Since the present case did not involve a specific statute or rule requiring witnesses to be "heard" and there was neither a magistrate nor a master, *Wingo v. Wedding* is inapposite.

While most of the precedents cited in support of the opinion of the Tenth Circuit Court of Appeals are from its own circuit, those taken from other circuits, such as the Third and Sixth, are not in conflict. Since no conflict is shown in the petition, review of this case on writ of certiorari is not warranted.

b. Applicable Law of Contracts

The opinion of the district court is replete with citations of precedents from the principal states of California (the state of execution and original performance of the contract in suit) and Colorado (the state in which performance is continuing, in breach, and in which enforcement is sought) as well as of this court, the Tenth Circuit Court of Appeals and various texts, none of which are asserted in the present petition to be in conflict with the conclusions in this case or with each other. Indeed, the Australian law was taken into consideration by the trial court and the appellate court to the extent that it was not only found not to apply, but also was not inconsistent with United States law in the absence of extra-territorial applicability of regulation 8 of the Australian Banking and Currency Regulations. (Appendix to Petition, 20A-21A, 41A-42A).

4. Conclusion

This is a simple contract case in which the threshhold question was the venue of the law as to execution of the contract. The venue was determined to be in California. Under California law the contract was held to be valid and enforceable. Since continued performance was and is in Colorado, the law of that state was held to be applicable to continued enforcement of the contract. Since the Colorado law was not in conflict with the law of California, performance was and is governed by Colorado law. Thus, there was no reason to reach the question of applicability of Australian law either as to execution or performance.

All of the protestations of Petitioners about "denial of due process" and applicability of the "treaty obligation" of the United States under the International Monetary Fund Agreement completely circumvent the issue of correctness of the threshhold question of venue of execution. Indeed Petitioners' positions have been shown to be so patently "illusory" that it would be a waste of the time of this court and the taxpayers' money to hear, on the merits, the unmeritorious questions of which reivew is sought.

Respectfully submitted,

FRANCIS C. BROWNE
Browne, Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006

and

EDWARD T. COLBERT
Browne, Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006

September 25, 1975

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SIMS CONSOLIDATED, LTD.,
Plaintiff,

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California qualified as a foreign corporation, doing business in the State of Colorado; and A. O. Smith CORPORATION, a New York corporation, doing business in the State of Colorado,
Defendants.

Civil Action No. 3632

NOTICE TO TAKE DEPOSITION BY VIDEO-TAPE

To the above named plaintiff
and his attorneys:
W. David Pantle
1900 First National Bank Building
Denver, Colorado 80202
Francis C. Browne, of Browne,
Beveridge, DeGrandi & Kline
1819 H. Street, N.W.
Washington, D.C. 20006

YOU ARE HEREBY NOTICED that on Monday, the 14th day of May, 1973, at 9:30 a.m., the defendants

will take the deposition of Robert S. Charles at 2700 Oak Knoll Avenue, San Marino, California, for the purpose of preserving his testimony at the trial of the above captioned case. Said deposition shall be taken pursuant to the Federal Rules of Civil Procedure, on oral interrogatories, in the presence of a notary public and a certified shorthand reporter, and shall be video-taped, and you shall be present, as you are so advised.

DATED this 7 day of May, 1973.

/s/John R. Trigg
John R. Trigg
of YEGGE, HALL & EVANS
Attorney for Defendants
1340 Denver Club Building
Denver, Colorado 80202 222-2855

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 7th day of May, 1973, I delivered by hand a copy of the foregoing Notice to Take Deposition by Video-tape to the attorney for the plaintiff, W. David Pantle, at 1900 First National Bank Building, Denver, Colorado.

/s/John R. Trigg

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of May, 1973, that I mailed a true and exact copy of the foregoing Notice to Take Deposition by Video-tape to the attorney for the plaintiff, Francis C. Browne, of Browne, Beveridge, et al, at 1819 H. Street, N.W., Washington, D.C. 20006, by depositing the same in the U.S. Mail, postage prepaid.

/s/John R. Trigg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SIMS CONSOLIDATED, LTD.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	3632
	)	
IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California qualified as a foreign corporation, doing business in the State of Colorado; and A.O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,	)	**STATEMENT IN OPPOSITION TO MOTION TO QUASH NOTICE OF DEPOSITION, AND MOTIO TO PERMIT DEPOSITION TO BE TAKEN BY VIDEOTAPE**
	)	
Defendants.	)	

COME NOW the defendants, above named, by and through their attorney, John R. Trigg of Yegge, Hall and Evans, and make the following statement to the Court as to why the plaintiff's Motion to Quash Notice of Deposition should be denied, and request the Court for an Order permitting the deposition to proceed to be taken, pursuant to the Federal Rules of Civil Procedure, in the presence of a notary public and certified shorthand reporter, and to also be videotaped, as permitted by the Federal Rules of Civil Procedure, Rule 30(b)(4), which provides:

> The court may, upon motion, order that the testimony at a deposition be recorded by other

> than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made; a party may nevertheless arrange to have the stenographic transcription made at his own expense.

It is provided in the Notice for Deposition previously issued that we shall provide a certified shorthand reporter to stenographically report said deposition to assure the accuracy of the videotape.

One of the primary contentions of the plaintiff is that they are inconvenienced by the fact that the deposition is going to be taken. We would respectfully submit that we have complied with the provisions of the Local Rules of Practice of the United States District Court for the District of Colorado, Rule 7(a), which provides that reasonable notice is five (5) days. Plaintiff further contends that the Notice of Deposition provides that the deposition will be taken by videotape and may involve considerable unnecessary expense for the parties. It should be pointed out to the Court that we verbally stated to counsel for the plaintiff that if he would stipulate to the taking of the deposition by videotape, as we asked him to do, that we would stand responsible for the cost of the videotaping of the deposition at no expense to him whatsoever. This included the statement that we would not attempt to tax such expense as a cost when we are ultimately successful in the defense of the case.

In paragraph 6 of ther [sic] Motion, the plaintiff's attorney contends that it is inconvenient for them to be in California on May 14, 1973, since Trial Briefs,

including proposed findings of facts and conclusions of law are required by the Pre-Trial Order to be exchanged by May 15, 1973. In response to this contention, we would merely point out to the Court that this deadline has been set since January of 1973, and their contention that they are going to prepare their Brief on the day before it is due does not deserve the consideration of this Court.

Finally, it should be pointed out that the plaintiff, in the "Supplementary Memorandum of Plaintiff in Opposition to Motion for Continuance", previously filed by the defendants, which has been denied by the Court, states in the last sentence thereof that they were willing to permit the deposition of Mr. A.C. King, one of the defendants' crucial witnesses, to be taken in Australia before the trial. Their contention that they are unable to get to California, but could have arrived in Australia for a deposition, deserves no further comment. The plaintiff further stated in the same "Supplementary Memorandum" that"

> "There is no need for the continuance, as adequate time remains to assemble any further evidence which the parties need for trial."

WHEREFORE, it is respectfully requested that this Court enter the Order permitting the deposition scheduled for May 14, 1973, to be taken as scheduled, and to enter an Order permitting the same to be recorded by videotape transcription and stenographically reported, but if the Court is not disposed to permit videotaping of the deposition, that the Court permit the deposition to proceed as scheduled, as reasonable notice has been given, as required by the Federal Rules of Civil Procedure, and the Local Rules

of Practice of the United States District Court for the District of Colorado.

Respectfully submitted,

/s/ John R. Trigg
John R. Trigg
of YEGGE, HALL & EVANS
Attorney for Defendants
1340 Denver Club Building
Denver, Colorado 80202 222-2855

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true copy of the foregoing Statement in Opposition to Motion to Quash Notice of Deposition, and Motion to Permit Deposition to Be Taken by Videotape, and a copy of defendants' Motion to Strike Plaintiff's Request for Statement of Facts and Opinions Held by Expert Witnesses Listed by Defendants, to the attorney for the plaintiffs, Mr. W. David Pantle, at 1900 First National Bank Building, Denver, Colorado, this 9th day of May, 1973.

/s/ John R. Trigg